CHAPTER- 5
HUMAN TRAFFICKING: NATIONAL LEGAL PERSPECTIVE

Human trafficking mostly of women and children in India is a matter of great concern. In the last few decades human trafficking has become a worrying phenomenon in India. India is considered as source, destination as well as a transit country for victims of trafficking in human beings, forced labour, fake marriages and migrant smuggling. It is a grave violation of the well defined fundamental and human rights of the victims. Human trafficking is considered as a part of the serious well organised crimes of the present day which transcends cultures, geography and time. Therefore, this chapter comprehensively discusses the national perspective of the problem of trafficking in human beings. It also makes an analysis of the working of various national laws relating to the human trafficking. Most importantly, this chapter will throw light on the various Constitutional provisions relating to human trafficking, the Justice Verma Committee Report of 2013, the Criminal Law (Amendment) Act, 2013. It further checks the enforcement and relevance of the various provisions of the Indian Penal Code pertaining to the human trafficking and Immoral Traffic (Prevention) Act, 1956.

5.1 National Perspective

India is considered as a source, destination and transit country for men, women and children trafficked for the purpose commercial sexual abuse and forced labour. Internal forced labour groups constitutes India's largest trafficking issue. Almost ninety percent of human trafficking is internal and mostly the victim belongs to the marginalised sections of society, including lower castes and tribal's. Debt bondage is a common characteristic of human trafficking in India. Not only men but women and children are also held in unending debt bondage and face forced labour in working in brick kilns, production mills, agriculture and other factories. The common feature of bonded and forced labour is the use of physical and sexual violence towards such victims. The forced labour of an estimated 20-65 million people constitute India's largest trafficking issue. Women and girls are mostly trafficked from within the country for commercial sexual abuse and for forced or fake marriages. Children are subjected to forced labour, to work in factories, work as domestic servants,

The Justice Verma Committee was constituted after the December 16, 2012 Nirbhaya gang rape at Delhi. The Committee submitted its report within a short possible time of one month which was followed by the Criminal Law (Amendment) Act, 2013.

The CIA, World Fact Book Solo, Skyhorse Publishing Inc. (2009), p. 320
beggars and are even used as armed combatants by some terrorists and insurgent groups. India is also a destination place for women and girls being trafficked from Bangladesh and Nepal. These women and girls are trafficked for commercial sexual exploitation and for false or forced marriages.3

United Nations has listed India as a country of high level origin and high level destination for today's enslaved people. A designation that places it among the world's top origin countries and top twenty three destination countries.4 India is also listed as a medium level transit country for victims of human trafficking. While United Nations ranks respective countries according to the number of persons reported trafficked between and through countries, the United States of America ranks States according to their efforts to eliminate all forms of trafficking. It is on this basis State Department of United States of America has given Tier 2 rank to India. Tier 2 rank means country not fully complying with the minimum standards for the total elimination of trafficking, but making significant efforts to do so.5 Earlier the Indian ranking was Tier 2 Watch List. Tier 2 Watch List rank is lower than the present rank. Present rank of Tier 2 has been given recently in 2013 to India.6

5.2 Magnitude of the Problem: National Estimates

The clandestine nature of human trafficking makes it very difficult to measure the actual magnitude of the problem. Though there are a number of studies and reports on trafficking in women and children but there are no reliable estimates of the extent and magnitude of trafficking. Roughly in India there are an estimated 2.3 million women and girl children in prostitution, a quarter of whom are minors and there are over 1200 red light areas all over India. More than 50,000 people mostly women and girl children have been trafficked to India. Every year 5000 to 11,000 Nepali women and girls are trafficked to India. Over the last ten years, it is estimated that over 30,000 women and girls have been trafficked from Bangladesh to India. Most victims of trafficking in India come from Andhra Pradesh, Karnataka and Uttar Pradesh, Odisha, Gujarat and Rajasthan which have become a source area today. Further 60% - 80% of these victims suffer from life threatening diseases with an increasing incidence of HIV/AIDS.7

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3 Ibid.
5 Ibid.
6 The Indian Express, June 28, 2011.
According to the National Crime Records Bureau (NCRB), in 2012 there were 3554 incidents of crime of trafficking reported as compared to 3517 cases in 2011, recording an increase of 1.1%. Table below shows the state-wise and UT-wise distribution of human trafficking crimes committed in 2012.

Table 1: Human Trafficking Cases Registered During 2012*

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8 National Crime Records Bureau, Ministry of Home Affairs, Govt. of India. For details see: [http://ncrb.nic.in/](http://ncrb.nic.in/), (Accessed on 03.12.2013)
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*Source: National Crime Records Bureau, Ministry of Home Affairs, Govt. of India. For details see: http://ncrb.nic.in/. (Accessed on 03.12.2013)*
Recently, the National Crime Records Bureau (NCRB), Ministry of Home Affairs, released the Crime in India- 2013 (Statistical Report of crimes committed all over the country) on 30th June 2014. Unfortunately, this time NCRB has not given separate statistical details of human trafficking crimes committed under the Indian Penal code and the Immoral Traffic (Prevention), Act, 1956. Instead the NCRB clubbed crimes of 2013 with the pending cases of 2012, which makes it difficult to present the actual picture of the magnitude of the problem of human trafficking in India.

5.3 The National Legal Framework on Human Trafficking

At the national level our Suprema Lex i.e the Constitution of India has recognised the right to freedom from forced labour and trafficking as a fundamental right. Under Article 23(1) "Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." Besides Article 23 there are other important provisions of the Constitution of India which are relevant for the purpose of this research on human trafficking. These include:

Article 14 provides for equality in general.\textsuperscript{10}

Article 15(1) prohibits discrimination on the grounds of religious race, caste, sex or place of birth, or of any of them.\textsuperscript{11}

Article 15 (3) provides for special protective discrimination in favour of women and child relieving them from the moribund of formal equality. It states that, nothing in this article shall prevent the state from making any law for the protection of women and children.\textsuperscript{12}

\textsuperscript{9} National Crime Records Bureau, Ministry of Home Affairs. Govt. of India, for details see: http://ncrb.nic.in/ (Accessed on 03.07.2014)

\textsuperscript{10} Article 14 of the Constitution of India provides that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

\textsuperscript{11} Article 15(1) of the Constitution of India apart from other things provide that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

\textsuperscript{12} Article 15(3) of the Constitution of India provides that nothing in article 15 shall prevent the state from making any special provision for women and children.
Article 16 (1) covers equality of opportunity in matters of public employment.\(^{13}\)

Article 21 provides right to life and personal liberty to all citizens.\(^{14}\)

Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.\(^{15}\)

Article 38 (1) enjoins the State to secure and protect as effectively as it may a social order in which justice – social, economic and political shall inform all the institutions of national life. It emphasises on the necessity of providing opportunities to enhance equality.\(^{16}\)

Article 39 the State should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work their age or strength.\(^{17}\)

Article 39 (f) provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity of existence.\(^{18}\)

Article 42 protects against inhumane working conditions.\(^{19}\)

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\(^{13}\) Article 16(1) of the Constitution of India provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

\(^{14}\) Article 21 of the Constitution of Indian provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

\(^{15}\) Article 24 of the Constitution of Indian provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

\(^{16}\) Article 38(1) of the Constitution of Indian provides that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

\(^{17}\) Article 39 of the Constitution of Indian provides that the state shall, in particular, direct its policy towards securing- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

\(^{18}\) Article 39(f) of the Constitution of Indian provides that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children.20

Article 46 directs the State to promote the educational and economic interest of women and weaker sections of the society and directs the state to protect them from social injustice and all forms of exploitation.21

In India trafficking has been an area of concern since the early 20th century. But more recently, after the Delhi gang rape (Nirbhaya) there has been a widening of the focus on the gender related issues which in turn gave way to the appointment of the Justice Verma Committee. The Verma Committee submitted its reports within a short possible time of one month. Following the Verma Committee recommendations, the President of India passed an Ordinance which was followed by the enactment of the Criminal law (Amendment) Act, 2013.22 By this amendment, Section 370 of the Indian Penal Code was substituted by Sections 370 and 370(A). These amended Sections of the Indian Penal Code provide:

370. (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports,
(c) harbours, (d) transfers, or (e) receives, a person or persons, by—
Firstly. — using threats, or
Secondly. — using force, or any other form of coercion, or
Thirdly. — by abduction, or
Fourthly. — by practising fraud, or deception, or
Fifthly. — by abuse of power, or

19 Article 42 of the Constitution of Indian provides that the state shall make provision for securing just and humane conditions of work and for maternity relief.
20 Article 45 of the Constitution of Indian provides that the state shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
21 Article 46 of the Constitution of Indian provides that the state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.23

Explanation 1.— The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2. — The consent of the victim is immaterial in determination of the offence of trafficking.

2. Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.24

3. Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.25

4. Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.26

5. Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.27

6. If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.28

23 The Indian Penal Code 1860, Section 370 (1).
24 Id. Section 370 (2).
25 Id. Section 370 (3).
26 Id. Section 370 (4).
27 Id. Section 370 (5).
28 Id. Section 370 (6).
7. When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.\textsuperscript{29}

370A. (1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.\textsuperscript{30}

(2) Whoever, knowingly or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.\textsuperscript{31}

Besides sections 370 and 370A there are various other provisions in the Indian Penal Code which criminalise activities like selling and buying of minors for the purpose of prostitution, kidnapping, abduction etc. For the purpose of this research significant among them are:

- Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.\textsuperscript{32}

- Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.\textsuperscript{33}
• Whoever wrongfully restrains any person in such a manner as to prevent that
person from proceeding beyond certain circumscribing limits, is said 'to
wrongfully confine' that person.\textsuperscript{34}

• Whoever assaults or uses criminal force against any woman, intending to
outrage or knowing it to be likely that he will there by outrage her modesty,
shall be punished with imprisonment of either description for a term which
may extend to two years, or with fine, or with both.\textsuperscript{35}

• Whoever kidnaps or abducts any woman with intent that she may be
compelled, or knowing it to be likely that she will be compelled, to marry any
person against her will, or in order that she may be forced or seduced to illicit
intercourse, or knowing it to be likely that she will be forced or seduced to
illicit intercourse, shall be punished with imprisonment of either description
for a term which may extend to ten years, and shall also be liable to fine.\textsuperscript{36}

• Procuration of a minor girl (below 18 years of age) from one part of the
country to another is punishable.\textsuperscript{37}

• importation of a girl below 21 years of age is punishable.\textsuperscript{38}

• Whoever kidnaps or abducts any person in order that such person may be
subjected, or may be so disposed of as to be put in danger of being subjected
to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing
it to be likely that such person will be so subjected or disposed of, shall be
punished with imprisonment of either description for a term which may extend
to ten years, and shall also be liable to fine.\textsuperscript{39}

• Whoever sells, lets to hire, or otherwise disposes of any person under the age
of eighteen years with intent that such person shall at any age be employed or
used for the purpose of prostitution or illicit intercourse with any person or for
any unlawful and immoral purpose, or knowing it to be likely that such person
will at any age be employed or used for any such purpose, shall be punished

\textsuperscript{34} Id. Section 340.
\textsuperscript{35} Id. Section 354.
\textsuperscript{36} Id. Section 366.
\textsuperscript{37} Id. Section 366A.
\textsuperscript{38} Id. Section 366B.
\textsuperscript{39} Id. Section 367.
with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.\textsuperscript{40}

- provides punishment for compelling any person to labour against his will.\textsuperscript{41}
- provides for the offence of sexual assault and its punishment.\textsuperscript{42}

The forced and child labour is prohibited under the \textbf{Bonded Labour System (Abolition) Act, 1976}\textsuperscript{43} and \textbf{Child Labour (Prohibition and Regulation) Act, 1986}.\textsuperscript{44} The Child Labour Act of 1986 prohibits employment of children in certain specified occupations and also lays down conditions of work for children.\textsuperscript{45}

\textbf{Information Technology Act, 2000}\textsuperscript{46} penalizes publication or transmission in electronic form of any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave or corrupt persons by reading, seeing or hearing the matter contained or embodied therein. This law is relevant in addressing the problem of pornography.\textsuperscript{47}

The \textbf{Juvenile Justice (Care and Protection of Children) Act, 2000}\textsuperscript{48} is enacted in consonance with the Convention on the Rights of the Child, 1989. It consolidates and amends the law relating to juveniles in conflict with law and to children in need of care and protection. This Act protects the children in need of care and protection, which includes the child who is found vulnerable and is likely to be inducted or lured into trafficking trap. This Act also empowers state governments to constitute Child Welfare Committees to look into the matters and needs of children. Recently this Act came into limelight against the backdrop of outrage against the lighter punishment of three years in a reform home given to a minor convicted in the December 16, 2012 Nirbhaya Delhi gang-rape case. Against nationwide outrage government tabled the Juvenile Justice (Care and Protection of Children) Bill, 2014 in the Lok Sabha. The Bill replaces word 'juvenile' by the word 'child' and 'juvenile in

\begin{itemize}
\item \textsuperscript{40} Id. Section 372.
\item \textsuperscript{41} Id. Section 374.
\item \textsuperscript{42} Id., Section 375 and 376.
\item \textsuperscript{43} The Bonded Labour System stands abolished throughout the country with effect from 25\textsuperscript{th} October, 1975.
\item \textsuperscript{44} The Act came into effect on December 23\textsuperscript{rd}, 1986.
\item \textsuperscript{45} The Child Labour (Prohibition and Regulation) Act, 1986, Section 3.
\item \textsuperscript{46} The Act came into force on October 27, 2009.
\item \textsuperscript{47} The Information Technology Act, 2000, Section 67.
\item \textsuperscript{48} The Act came into effect from April 1\textsuperscript{st}, 2001.
\end{itemize}
conflict with law' with 'child in conflict with law'. The Bill also provides that the child above 16 years of age committing heinous crimes like rape would be tried in a regular court. However, the Bill provides that in no case juvenile involved in a heinous crime will be sentenced to death penalty or life imprisonment.49

The Indecent Representation of Women (Prohibition) Act, 198650 defines indecent representation of women as the depiction in any manner of the figure of a women, her form of body or any part thereof in such a way as to have the effect of being indecent or derogatory to, or denigrating of women, or is likely to deprave, corrupt or injure public morality. This special Act puts a clear restriction on the publishing or sending by post of books or pamphlets containing indecent representation of women and prohibits all persons from getting involved directly or indirectly in the publication or exhibition of any such advertisement containing indecent representation of women in any form.51

The Child Marriages Restraint Act, 192952 defines the terms child marriage, child, contracting parties, minors etc. It specifically sets down the legal age of marriage as 18 years for girls and 21 for boys. The Act also empowers the courts to issue injunctions prohibiting child marriages both of boys and girls.53

Various state governments have taken initiatives towards the prohibition and regulation of exploitation of women and children, but they do not seem to be adequate. The State of Mysore was the first State to take steps against such practice. In 1924, the Indian Penal Code was amended, wherein Sections 372 and 373 declared illegal the practice of dedicating girls to temples for the ultimate purpose of engaging them into the prostitution.54 The Karnataka Devadasi (Prohibition of Dedication) Act 198255 declares as unlawful the very act of dedication, whether the dedication is done with or without the consent of the dedicated woman. Similarly under the

50 The Act came into effect on December 23rd, 1986.
51 The Indecent Representation of Women (Prohibition) Act, 1986, Section 3 & 4.
52 The Act came into effect from April 1st, 1930.
53 The Child Marriages Restraint Act, 1929, Section 12.
54 Sankar Sen, Trafficking in Women and Children in India , Orient Longman (2005), p. 196
55 Published in the Karnataka Gazette Part IV-2A (Extraordinary) No. 75 on February 3rd, 1982
Andhra Pradesh Devdasi (Prohibiting of Dedication) Act 1988,\textsuperscript{56} whosoever performs, promotes, abets or takes part in a dedication ceremony is liable to punishment with imprisonment for three years and also fine.\textsuperscript{57}

The Government of Goa enacted the \textbf{Goa Children's Act, 2003}.\textsuperscript{58} This Act is special in its application because it gives a legal definition of human trafficking for the first time in Indian Jurisprudence. It addresses several child rights issues in an integrated manner. Under this special Act, the owner and manager of the premises will be held responsible for the safety of any child on that premises. The owner and manager is also liable if any child enters any room without registration. This legislation provides stringent punishment for those persons who use children and make children available for commercial sexual exploitation illegal adoption etc.\textsuperscript{59}

In India, poverty ridden persons are often brought to the cities and instigated to sell their body organs for money. With the increase in the demand for transplantation of human organs exploitation of people to sell their organs also increases. This type of commercial exploitation of human organs is not just abusive but life threatening as well. In India trade in human organs in any form is prohibited under the \textbf{Transplantation of Human Organs Act, 1994}.\textsuperscript{60} The most important section of the Act is section 19. Under this section any person who carries out commercial dealings of human organs shall be punished. The Act punishes any person who:

- makes or receives any payment for the supply of or for an offer to supply, any human organ.\textsuperscript{61}

- seeks to find a person willing to supply for payment any human organ.\textsuperscript{62}

- offers to supply any human organ for payment.\textsuperscript{63}

\textsuperscript{56} The Act prohibits the dedication of women as Devadasi (women were given as Devadasis to Hindu deities, Idols, objects of worship, temples and other religious institutions or places of worship) in the State of Andhra Pradesh.

\textsuperscript{57} The Andhra Pradesh Devdasi (Prohibiting of Dedication) Act 1988, Section 5.

\textsuperscript{58} The Act came into force on July 8\textsuperscript{th}, 2003.

\textsuperscript{59} Supra note 54.

\textsuperscript{60} The Act came into effect on July 8\textsuperscript{th}, 1994.

\textsuperscript{61} The Transplantation of Human Organ Act, 1994, Section 19(a)

\textsuperscript{62} \textit{Id.} Section 19(b).
- initiates or negotiates any engagement involving the making of any payment for the supply of or for an offer to supply, any human organ.64

- takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement.65

- publishes or distributes or causes to be published or distributed any advertisement, involving persons to supply for payment of any human organ, offering to supply any human organ for payment or indicating that the advertiser is willing to initiate or negotiate any arrangement 66.

Besides these, at the national level we have one main legislation with deals with the prohibition and regulation of commercial sexual exploitation in detail. This legislation was previously known as Suppression of Immoral Traffic in Women and Girls Act, 1956. After the amendment Act of 1986 it is renamed as Immoral Traffic (Prevention) Act, 1956

5.4 Immoral Traffic (Prevention) Act, 195667

The Immoral Traffic (prevention) Act, 1956 is a very comprehensive and detailed legislation which gives power and strength to the law enforcement and justice delivery agencies to combat and prevent trafficking in human beings. Since its enactment in 1956, the legislation has been amended twice, in 1978 and 1986. The amendment of 1986 focuses on prevention which is a novel feature of this amendment. However, for various known or unknown reasons different provisions of this special law are not being used and, furthermore are often misused and abused.68 Mostly ignorance and lack of understanding of these provisions leads to abuse and misuse.

63 Id. Section 19(c).
64 Id. Section 19(d).
65 Id. Section 19(e).
66 Id. Section 19(f)(i), (ii) and (iii).

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The government of India in 1950 ratified an International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution and Others.  

Thus, it became necessary and desirable for the Central Government to pass a law which not only secure uniformity but also would be a sufficient deterrent for the prohibition and prevention of human trafficking. Thus, the Suppression of Immoral Traffic in Women and Girls Act, 1956, was enacted. Its principle object is to prevent commercialisation of the vice and trafficking among women and girls. Experienced gained in the implementation of the act has brought to light certain inadequacies. Therefore, it was proposed to amend the Act in 1978 to make good these inadequacies. While formulating the amendments, the recommendations made by an Expert Committee appointed by the Department of Social Welfare, by the Law Commission as contained in its Sixty-Fourth Report and by this committee on the Status of Women in India were also considered. The highlights amendment are as follows:

- Amendment empowers state governments to declare certain areas, in the public interest to be places where prostitution will be prohibited. While notifying such areas, due regard will be given to the kinds of persons frequenting such areas, the nature and density of population in those areas and other relevant considerations.

- In order to have adequate man-power to deal with offences under the Act, it is proposed that the special police officers to be appointed which shall not be below the rank of an Inspector of Police. An enabling provision is being made to empower the District Magistrate to appoint retired police or military officers as special police officers with a view to mobilise additional man power resources in the community.

- In view of the practical difficulties in obtaining necessary cooperation from respectable local women, the provision requiring the presence of a woman

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69 The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others is a resolution of the UN General Assembly. It was approved by the General Assembly on 2 December 1949 and came into effect on 25 July 1951.

70 The Immoral Traffic (Prevention) Act, Section 7, substituted by the Immoral Traffic (Prevention) Amendment Act, 1978, (w.e.f. 2.10.1979)

71 Id. Section 13.
witness of the locality during a search, is proposed to be modified to provide that the woman witness need not necessarily be of the locality in which the place to be searched is situated.\textsuperscript{72}

- The Act does not contain any provision for a summary trial of cases under the Act, as a result of which the disposal of cases often takes a long time. This lacuna leaves enough scope for unscrupulous elements involved in the profession of commercialised prostitution to manipulate material for delaying cases in Court to their advantage and defeating the purpose of the Act. It is, therefore, proposed to add an enabling provision to provide for summary trial of cases under the Act. The proposed provision will not however, preclude the Magistrate from adopting a regular procedure if it is considered necessary to do so in the interest of justice.\textsuperscript{73}

Despite the amendments of the Act in 1978 it was felt that the enforcement of the Act was not been effective enough to deal with the problems of immoral trafficking in all its dimensions. Various suggestion have been made to the government by voluntary organisations working for women, advocacy groups and various individuals urging the enlargement of the scope of the Act, to make penal provisions more stringent and to provide for certain minimum standards for correctional treatment and rehabilitation of victims.\textsuperscript{74} In view of the aforesaid suggestions, it is proposed to widen the scope of the Act to cover all persons, whether male or female who are exploited sexually for commercial purposes and to make further amendments in the Act. The main amendments made in 1986 are as follows:

- the name of the Act has been changed from the Suppression of Immoral Traffic in Women and Girls Act, 1956 to Immoral Traffic (Prevention) Act, in view of the widening of the scope of the Act to cover all persons, whether male or female, who are exploited sexually for commercial purposes.\textsuperscript{75}

\textsuperscript{72} Id. Section 15(2).
\textsuperscript{73} Id. Section 22-B.
\textsuperscript{74} Mostly NGO's who have been working on the gender related issues recommended various amendments.
\textsuperscript{75} Substituted by Amendment Act of 1986, (w.e.f. 26.1.1987)
- to make offences under the Act involving children and minors more stringent by enhancing the period of imprisonment when offences are committed against children and minors.76

- trafficking police officers appointed under the Act will be empowered to investigate offences having interstate ramifications.77

- licensing authorities are empowered to cancel the licences of hotels where children or minors are detected to be used for purposes of prostitution.78

- in cases of seduction in custody, the punishment is sought to be enhanced to that laid down for rape in the Indian penal Code.79

- provision is being made for the medical examination of all persons removed from brothels after the search has been carried out.80

- to provide that women or girls removed in pursuance of a search made under Section 15 shall be interrogated only by women police officers and where no women police officers are available, they shall be interrogated only in the presence of a woman social worker.81

- also enabling provisions are being added in the Act to empower the Central Government to set up special courts with jurisdiction to try offenders which have interstate ramifications.82

5.4.1 Salient Features of the Immoral Traffic (Prevention) Act, 1956

In order to examine the law, we need an overview of the provisions of the Immoral Traffic (Prevention) Act, 1956. The Section 2 of the ITP Act provides definitions to be used in context of the implementation of the Act. The term brothel is defined as any house, room, conveyance or place or any portion of any house, room,
conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. A child under this Act is a person who has not completed the age of sixteen years and a major is a person who has not completed the age of eighteen years and a minor is a person who has completed the age of sixteen years. Prostitution under this Act means the sexual exploitation or abuse of person for commercial purposes and the term prostitute shall be construed accordingly. Protective home means an institution by whatever name called in which persons who are in need of care and protection may be kept.83

Section 3 of the Act says any person who keeps or manages or assists in the keeping or management of a brothel shall be punished on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the second event or subsequent event person shall be imprisoned for two years which may also go up to five years and also a fine of five of two thousand rupees may be imposed. It further provides that any person who being the tenant, lessee, occupier or person in charge of any premises, uses or knowingly allows any other person to use such premises as a brothel shall be punishable on conviction with imprisonment for a term which may extend to two years with a fine of two thousand rupees and in any subsequent event with imprisonment of five years and two thousand rupees fine.84

According to section 4 of the Act, any person who is above the age of 18 years and who knowingly lives on the earnings of the prostitution of any other person shall be punished with imprisonment for a term which may extend up to two years or with fine which may extend to one thousand rupees or both and if such earnings is related to the prostitution of minor then the term may be extended to not less than seven years and not more than ten years.85

Similarly, Section 5 of the ITPA provides that procuring or attempting to procure or inducing of a person whether with or without his consent for the purpose of prostitution or inducing of a person to carry on prostitution is punishable with rigorous imprisonment for a term not less than three years and not more than seven

83 Id. Section 2.
84 Id. Section 3.
85 Id. Section 4.
years and fine of two thousand rupees and if the offence is committed without the will of any person then the term may exceed up to 14 years. If same offence is committed against child, person shall be punished with imprisonment of not less than seven years and which may extend till fourteen years.\textsuperscript{86}

Section 6 of the Act, states that detaining a person whether with or without his consent in any brothel or in any premises so that such person may have sexual intercourse with a person other than his spouse is punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.\textsuperscript{87}

According to Section 7 any person who carries prostitution in the area or areas within a distance of two hundred meters of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place as notified by the State government that prostitution shall be carried out in such areas shall be punishable with imprisonment for a term which may go up to three months and if same offence is committed against minor with imprisonment of not less than seven years and also fine.\textsuperscript{88}

Section 8 of the Act provides punishment for the person who attracts by words, gestures, wilful exposure of the person or solicits or molests any person so as to offend public decency for the purpose of prostitution. Further Section 9 provides any person having the custody, charge or care of any person causes or aids or abets the seduction for prostitution of that shall be punished.\textsuperscript{89}

As per Section 13(1) of the Act, the State Government shall appoint a special police officer for each area to be specified by the Government to deal with the offences under this Act. Further Section 13(4) of the act empowers the Central Government to appoint trafficking police officers with nationwide jurisdiction for the investigation of cases of interstate trafficking in women.\textsuperscript{90}

\textsuperscript{86} Id. Section 5.
\textsuperscript{87} Id. Section 6.
\textsuperscript{88} Id. Section 7.
\textsuperscript{89} Id. Section 8 & 9.
\textsuperscript{90} Id. Section 13.
Section 14 provides that the offences under this Act are cognisable and arrest may be made without warrant only by the special police officer or under his guidance. Section 15 gives authority to such special police officers to enter any premises for search without warrant if such police officer has reasonable belief that that offence under this Act has been or is being committed in respect of a person living in any premises.91

Accordingly Section 18 of the Act, if the Magistrate comes to know that a place within a distance of 20 meters of any public place is being used as a brothel by any person or is being used by prostitutes, he may issue a show cause notice to the owner or lessor of that premises. Under Section 21 the State Government may establish protective homes and corrective institutions for convenience of the victims under these sections.92

5.4.2 Constitutional Validity of the Immoral Traffic (Prevention) Act, 1956

The constitutional validity of the various provisions of the Act has been discussed at length in *Shama Bai v. State of Utter Pradesh*93 by Sahai, J. in a very well reasoned and a lucid judgement. The judge is doubtful about the validity of Section 4(2) of the Act. In fact he has tentatively come to the conclusion that these provisions of the Act violate the fundamental rights guaranteed by the Constitution, but he has not expressed any final opinion. He did not deem it necessary to issue a notice to the respondents and the Attorney-General of India as he had come to the conclusion that the petition before him had been filed prematurely and could not be maintained. He held the other provisions of the Act constitutionally valid. The learned judge further observed that even if Section 4(2) and Section 20 could be declared to be invalid, the entire Act does not fall because the impugned Act minus these provisions can remain unaffected, as section 4(2) and section 20 can be severed from the rest of the Act.

None of the provisions of the Immoral Traffic (Prevention) Act have had the effect of stopping the profession or trade of prostitution altogether. The only question,

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91 Id. Section 14 & 15.
92 Id. Section 18, 20 & 21.
93 AIR 1959 All 57 at pp. 61 to 63.
which arises therefore, is whether the restrictions which are imposed upon the trade or profession of a prostitute by means of the provisions of the Act are reasonable restrictions. Section 3 only punishes the running of a brothel. It would be noticed that what has been prohibited is not the profession or trade per se of a prostitute but the carrying out of that profession for the gain of another person or for the mutual gain of two or more persons. This section has obviously been enacted to prohibit exploitation of a prostitute by a person who is not a prostitute, or by one prostitute of another. The Section will also have the effect of mitigating much of the evils of the prostitution because it is well known that the upkeep of brothels not only encourages prostitution but also leads to the commission of various other offences.  

The provisions of section 4 are justifiable on the ground that to allow a person over the age of eighteen years to live on the earnings of a prostitute is not only to encourage prostitution but also to offer inducement to the prostitute to carry on her profession or trade which she may not be inclined to carry on otherwise. Similarly, the presumption against touts and pimps or persons who exercise control, direction or influence over a prostitute or aid, abet or compel her to carry on the profession or trade of a prostitute is a reasonable presumption and is in the interest of the public at large. Similarly, the bar against procuring, inducement or taking a woman or girl for the sake of prostitution under Section 5 is a bar justifiable in public interest and is restriction which must held to be reasonable. The same thing may be said about the bar against detaining a woman or a girl in premises where prostitution is carried on under Section 6 of the Act.

The restriction imposed by Section 7 of the Act on a prostitute not to carry on her trade or profession in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other place of any kind as may be notified in this behalf by the Commissioner of Police or the District Magistrate is also a bar in the interest of the general public. Nobody can seriously doubt that it is not in the public interest to allow prostitution to be carried on the places mentioned above. The idea behind the enactment of Section 7 is that the atmosphere of places of public religious worship,

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94 Ibid.
95 Ibid.
educational institution, hostel, hospital, nursing home, etc. should be kept pure and free from the contaminated atmosphere of a place where prostitution is being carried on. It cannot be denied that this is a reasonable restriction. The bar created against a tenant, landlord, etc. of any premises which fall within two hundred yards of the places mentioned under Section 7 and where prostitution is carried on is also a reasonable restriction.\footnote{Ibid.}

Coming to Section 8, the bar against attempting or attracting or endeavouring to attract the attention of any person for the purpose of prostitution by words, gestures, or wilful exposure of a person for purposes of prostitution or loitering for the purpose of prostitution in a manner which may cause obstruction or annoyance to any person residing nearby or passing by such public place or to offend public decency for the purpose of prostitution is a bar which must be accepted to be a reasonable restriction in the interest of the society as a whole.\footnote{Ibid.}

Similarly no objection can be made against the provisions of section 9 which prohibit the seduction or the aiding or abetting of seduction of a person for prostitution. No objection can also be made against section 12 on the ground of unreasonableness as that section authorises a Magistrate, when convicting a person who is a habitual offender, under the Act, to bind him over for a period not exceeding three years.\footnote{Ibid.}

In \textit{Raj Bahadur v. Legal Remembrance to the Government of West Bengal},\footnote{AIR 1953 Cal 522 at p. 523.} the question of the constitutional validity of section 13 of the Bengal Suppression of Immoral Traffic Act, 1933, which was analogous to section 15 of the present Act, was considered by the Calcutta High Court. The court observed as under:

"Section 13 of the Bengal Suppression of Immoral Traffic Act is concerned with the removal of a minor girl from a brothel or from premises which is used as a brothel and does not in terms authorise the arrest of any such girl. The word arrest under Article 22 of the Constitution has a much restricted meaning and does not include the removal of a minor girl under Section 13 of the Act. The scheme of the
Bengal Act is to provide for the salvaging of such children as are being exploited or are likely to be exploited for immoral purposes. While the Constitution prohibits discrimination it provides for protection of women and children who may be said to suffer from a certain amount of disability either to infringe Article 21 or Article 23 of the Constitution and the removal and subsequent detention of the girl under the provisions of the Act were and are legal.  

The Calcutta High Court based its decision on the judgement of the Supreme Court in *State of Punjab v. Ajaib Singh* a case under the Abducted Persons (Recovery and Restoration) Act, 1949. In that case their Lordships held that the physical restraint put upon an abducted person in the course of recovering and taking that person into custody under Section 4 of the impugned Act could not be regarded as arrest and detention within the meaning of Articles 22(1) and 22(2) of the Constitution.

Thus, it can be said that the Immoral Traffic (Prevention) Act, 1956 is constitutionally a valid legislation and it does not violate any of the fundamental rights enshrined under the Constitution of India.

**5.4.3 Critique of the Immoral Traffic (Prevention), Act 1956**

Immoral Traffic (Prevention), 1956 Act has faced lot of criticism for not addressing the issue of human trafficking in a holistic manner. A more detailed and comprehensive critical analysis of the various provisions of the Act is attempted hereunder:

Section 2(a) of the Immoral Traffic (Prevention) Act defines a brothel to include any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for the purpose of sexual exploitation or abuse for the profit of another person or for the mutual profit of two or more prostitutes. The Court in *Sushila v. State of Tamil Nadu* has held that a solitary instance of prostitution does not make the place a brothel. The Court in another important case has held that a solitary instance of prostitution does not make the place a brothel. The Court in another important case.

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100 Ibid.
102 1982 Cri LJ 702 (Mad).
103 *In re John* AIR 1966 Mad. 167.
has held that to call a place or any premises as brothel, the actual prostitution of a woman should take place for the gain of another person. Thus, this definition of brothel as place for the mutual benefit of two prostitutes converts commercial sex workers who work without any force or compulsion into criminals.

The ITP Act does not properly address the issue of child prostitutes directly as a separate category. It unfortunately does not contain any special provision related to children, mostly the treatment of rescued children. However, Section 6(2) of the Act provides that where any person is found with a child in a brothel, it shall be taken unless contrary is proved, that he has committed an offence under Section 6(1).104

The Immoral Traffic (Prevention) Act, 1956 is the only central legislation that deals with the trafficking in persons, but unfortunately fails to lay down a meaningful definition of the human trafficking. Even the Immoral Traffic (Prevention) Amendment Bill, 2006 does not define human trafficking in consonance with the definition given under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.105 Further, the Bill considers human trafficking can only be for the purpose of commercial sexual exploitation. It does not cover other forms of human trafficking like organ trade, forced labour, begging etc.

Section 7 of the Act criminalises prostitution in the vicinity of public places also Act imposes a higher penalty if a minor is involved.106 The amendment to the Act increases the penalty if the offence is committed against a person below the age of eighteen years. This seems on the face of it a welcome step. However, the failure is that it does not provide any provision for the protection of children trafficked for prostitution.

104 Section 6(1) makes a person liable for punishment if he or she detains a person in premises where prostitution is carried on. It could be in a brothel or in any premises with intent that such person may have sexual intercourse with that person who is not the spouse of such person.

105 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 defines 'Human trafficking' as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include at a minimum the exploitation of the prostitution of other or other forms of sexual exploitation, forced labour or services, slavery or practices, similar to slavery, servitude or the removal of organs".

106 The Immoral Traffic (Prevention) Act, 1956, Section 7-A.
Further ITP Act, states soliciting an act of prostitution is an offence. Under this provision majority of the women are arrested for soliciting customers, since the real culprits and traffickers are seldom identified and arrested. The lacunae in the act is that the prosecution requires such culprits must be testified by the sex workers but it seems impossible as the livelihood of these sex workers is dependent on these third parties. Therefore they are unlikely to testify against them. Both the amendments to the ITP Act do not address this issue.\footnote{Id. Section 8.}

Under section 10(b) of the Act if a woman is held for any offence under Section 7 and Section 8, she may be sent to the corrective institution for not less than two years and not less than five years. This maximum stay of females offenders in corrective institutions further criminalises prostitutes.\footnote{Id. Section 10-B.}

Further, Immoral Traffic (Prevention) Act does not make any provisions for the care and protection of the victims of human trafficking. Many NGO's and Civil Society Groups have turned to the court for addressing this issue and seeking guidelines from the court regarding the victim protection by safeguarding the rights of the trafficked victims who more often are exploited by the traffickers in spite of being in the police custody.\footnote{A number of Public Interest Litigations have been filed in the Hon'ble Supreme Court of India in this regard.}

It is a clear and an unambiguous fact that the number of sex workers arrested under the Immoral Traffic (Prevention) Act are significantly higher than the number of traffickers, pimps and brothel keepers. Thus, it is clear that the Act is enforced only against sex workers. The rehabilitation and correction institutes are not very well equipped to deal with the sheer number of women convicted under the various provisions of the Act. The vocational training given to such victims is largely inadequate. The system in our country fails to provide any practical skills needed in today's complex world.\footnote{Trafficking and the Law, Human Rights Law Network, New Delhi (2011), p. 62} This becomes a vicious circle wherein the victim is seldom rehabilitated.

instead of being protective. In most of the provisions penalties have been increased. Still the legal status of sex workers remains uncertain. The role of NGO’s should have been considered in the Act for the proper protection and rehabilitation of the sex offenders. Thus, till now the Immoral Traffic (Prevention) Act remains an adversary for the victims of the human trafficking.  

5.5 The Immoral Traffic (Prevention) Amendment Bill, 2006

The Immoral Traffic (Prevention) Act 1956 makes human trafficking and sexual commercial exploitation of persons a punishable offence. This Act basically was in consonance with the International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution and Others, which India signed on May 9th, 1950. However, the Immoral Traffic (Prevention) Act 1956 did not prove an effective legal instrument to curb the menace of human trafficking. Therefore, for the third time a bill is proposed to amend the Act. The Immoral Traffic (Prevention) Amendment Bill was introduced in the Lok Sabha on 22nd May, 2006.  

5.5.1 Key Issues of the Bill and its Analysis

The Immoral Traffic (Prevention) Amendment Bill 2006 aims to curb the trafficking in persons for sexual exploitation. The Bill does not prohibit prostitution. It addresses the problem of human trafficking through the supply and demand mechanisms. That is to say it punishes traffickers and provides penalties for clients. The Bill defines prostitution as sexual exploitation or abuse of persons for commercial sexual purpose and a brothel as any house or place which is used for purposes of sexual exploitation for mutual gain or for the gain of another person. The Bill does not penalise an individual if he is in prostitution for his own gains, it only penalises prostitution if carried on in a brothel or from any public place within 200 metres of an education institution, place of religious worship, hotel, hospital, nursing home or any other place notified by the Commissioner of Police or Magistrate. Such a clause in the Bill technically makes it impossible for a person to operate as a prostitute. In researcher's opinion the Bill lacks clarity on an extremely relevant issue i.e. whether

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111 Ibid.
112 The Bill has been referred to the Parliamentary Standing Committee on Human Resource Development.
prostitution ought to be a legitimate way of earning a living if a person enters or stays in the trade out of his own choice.

The Bill seeks to penalise any person who visits a brothel for the purpose of sexual exploitation of a trafficked person. According to the researcher it would be impossible for a person visiting a brothel to distinguish between a trafficked person and person who is not trafficked? This means a person visiting brothel can only be punished if he exploits a victim of human trafficking but not otherwise. The Bill again lacks clarity on this point.

Any person visiting or found in a brothel can be punished if the purpose of the visit is sexual exploitation of a trafficked person. However, the term sexual exploitation itself is not defined in the Bill. Therefore, it could lead to unnecessary harassment of every person who visits a brothel irrespective of his visit.113

India is a signatory to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime. Under this Protocol trafficking in persons is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force. Exploitation shall include, at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or of the removal of organs." 114 While the United Nations Protocol covers human trafficking for situations other than prostitution, but the Bill only penalises the offence of trafficking if the person is used for prostitution. Human trafficking for the purpose of forced labour, pornography, organ trade, begging, camel jockeying and domestic labour do not fall under the definition of the Bill. There are a number of laws to curb these practices but there is no one comprehensive law on the subject of trafficking in human beings. The existing laws are linked only to prostitution or commercial sexual exploitation.115

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113 Immoral Traffic (Prevention) Amendment Bill, 2006, Section 5(C).
115 Supra note 113 at Section 5(A).
Further, the Bill lowers the minimum rank of a special officer authorised to enforce the provisions of this Act, from Inspector to Sub-Inspector. This lowering of the rank for arrest and search without warrants could lead to a greater harassment of prostitutes.116

The Bill provides that the central government and each state government may establish an authority to curb the offence of human trafficking but it does not specify the role, function and composition of such authorities.117

Thus, it can be said that the Bill provides a cure only to few ailments like penalising prostitutes for soliciting clients but gives birth to another group of ailments. Therefore, it becomes need of the hour that before passing the Bill, it should be comprehensively debated and analysed as per the International Standards and as per the guidelines and recommendations of the Justice Verma Committee.118

5.6 Concluding Remarks

India's pivotal role and responsibility in curbing the menace of human trafficking begins with the Constitutional mandate set out in fundamental rights chapter of the Constitution. There are a plethora of other Constitutional provisions, national and state laws which directly or indirectly deal with the issue of trafficking in human beings. Furthermore, India has made a number of international commitments relating to the combating of human trafficking. First such international commitment is reflected by enacting Immoral Traffic (Prevention) Act, 1956. This Act was enacted after India ratified the United Nations Anti-Trafficking Convention. However, the ITP Act has faced a lot of criticism for not addressing the issue of human trafficking in a holistic manner. Reports on the enforcement of the provisions of the Act reveal that far from meeting an objective of stopping trafficking and commercial sexual exploitation, the law has produced a scenario where prostitutes have been arrested rather than traffickers and exploiters.

116 Amendment to Section 13 of Immoral Traffic (Prevention) Act, 1956.
117 Supra note 113 at Section 13(A).
118 Justice Verma Committee was appointed after the Nirbhaya Delhi Gang rape on 16th of December 2012. The Verma Committee submitted its reports within a short possible time of one month. Following the Verma Committee recommendations, the President of India passed an Ordinance which was followed by the enactment of the Criminal law (Amendment) Act, 2013.
An attempt is being made in this research study to provide recommendations and suggestions for improving the existing law on the issue. The anomalies have been highlighted which will be of assistance in the drafting of a comprehensive law on the matter. The lacunas subsisting in the current laws need to be plugged to increase the effectiveness of addressing the issue at large.